



LEGAL SERVICES CORPORATION

45 CFR Part 1640

Application of Federal Law to LSC Recipients

AGENCY: Legal Services Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: This proposed rule updates the Legal Services Corporation (LSC or Corporation) regulation on the application of Federal law to LSC recipients. The FY 1996 appropriations act (incorporated in LSC's appropriations by reference annually thereafter) subjects LSC recipients to Federal law relating to the proper use of Federal funds. This proposed rule will provide recipients with notice of the applicable Federal laws each recipient must agree to be subject to under this rule, the consequences of a violation of an applicable Federal law, and where LSC will maintain the list of applicable laws.

DATES: Comments must be submitted by [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Written comments must be submitted to Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street N.W., Washington, DC 20007; (202) 337-6519 (fax) or lscrulemaking@lsc.gov. Electronic submissions are preferred via email with attachments in Acrobat PDF format. Written comments sent to any other address or received after the end of the comment period may not be considered by LSC.

FOR FURTHER INFORMATION CONTACT: Stefanie K. Davis, Assistant General Counsel, Legal Services Corporation, 3333 K Street N.W., Washington, DC 20007; (202) 295-1563 (phone), (202) 337-6519 (fax), or lscrulemaking@lsc.gov.

SUPPLEMENTARY INFORMATION:

I. Statutory and Regulatory Background

Section 504(a)(19) of LSC's FY 1996 appropriations act required LSC recipients to enter into a contract that subjected recipients to "all provisions of Federal law relating to the proper use of Federal funds." Sec. 504(a)(19), Pub. L. 104-134, title V; 110 Stat. 1321. By its terms, a violation of Sec. 504(a)(19) renders any LSC grant or contract null and void. The provision has been incorporated by reference into each of LSC's annual appropriations act since. Accordingly, the preamble and text of this proposed rule continue to refer to the appropriate section number of the FY 1996 appropriations act.

The Corporation first issued 45 CFR Part 1640 as an interim rule in 1996 to implement Sec. 504(a)(19). 61 FR 45760 (Aug. 29, 1996). The interim rule was put in place to provide immediate guidance to LSC recipients on legislation that was already in effect and carried significant penalties for noncompliance. *Id.* In the preamble to the interim rule, LSC announced that it was interpreting the statutory phrase "all provisions of Federal law relating to the proper use of Federal funds" to mean "with respect to [a recipient's] LSC funds, all programs should be subject to Federal laws which address issues of waste, fraud and abuse of Federal funds." *Id.* LSC based its interpretation on legislative history that appeared to limit the applicable laws to those dealing with fraud, waste, and abuse of Federal funds.

In particular, LSC relied on two congressional documents to support its interpretation. First, the Corporation cited to the House Report for H. R. 2076, which was a prior effort to enact a provision similar to section 504(a)(19). The relevant language in that report stated:

[S]ection 504(20) requires all programs receiving Federal funds to comply with Federal statutes and regulations governing waste, fraud, and abuse of Federal funds.

H. Rep. No. 104-196, 104th Cong., 1st Sess. 116 (July 1995) (emphasis added). Second, LSC cited section 5 of H. R. 1806, the Legal Services Reform Act of 1995, which was an unsuccessful attempt to revise the LSC Act. As an extension of his remarks introducing H.R. 1806, Rep. McCollum submitted a partial summary of the bill, including a discussion of section 5 entitled “Application of waste, fraud, and abuse laws.” 141 Cong. Rec. E1220-21 (daily ed. June 9, 1995). Section 5 itself was titled “Protection Against Theft and Fraud,” and expressly included provisions of Title 18 of the U.S. Code pertaining to criminal offenses involving the misuse of Federal funds, as well as provisions of the False Claims Act. H. R. 1806, 104th Cong., § 5 (1995).

LSC adopted the list of statutes in section 5, with one exception. Through negotiation with LSC’s Office of Inspector General (OIG), LSC determined that two other criminal statutes should be included in the list. 61 FR 45760. These statutes prohibit bribery of public officials and witnesses and conspiracy to defraud the United States. Id. at 45761.

Minor changes to the interim rule, not affecting this list, were made before the final rule was published in 1997. 62 FR 19424-19427 (April 21, 1997). LSC has not revised Part 1640 since the publication of the final rule.

II. LSC's Consideration of the Applicable Federal laws.

Since the final rule was published, Congress has amended or passed other Federal laws relating to the proper use of Federal funds. In 2014, OIG raised concerns that the § 1640.2(a)(1) list of applicable Federal laws is now under-inclusive. As an example, OIG noted the omission of 18 U.S.C. 666, which prohibits theft or bribery concerning programs receiving Federal funds and is the basis for many of OIG's referrals to the Department of Justice for prosecution. Subsequently, LSC staff researched other Federal laws applicable to fraud, waste, and abuse of Federal funds. The search revealed at least two other Federal laws relating to the proper use of Federal funds currently missing from the § 1640.2(a)(1) list: 18 U.S.C. 285—Taking or using papers relating to claims, and 18 U.S.C. 1031—Major fraud against the United States.

In response to OIG's concern, LSC initially considered removing all statutory references from the regulation and instead drafting a definition of "Federal law relating to the proper use of Federal funds" to encompass all the applicable Federal laws without the need to specifically list the statutory references. LSC staff concluded that any possible definition would either narrow the scope of Section 504(a)(19) too much or allow for too broad of an interpretation of the provision. LSC subsequently based its options for revising Part 1640 on two considerations: whether the list of "Federal law relating to the proper use of Federal funds" should remain in Part 1640 or be moved to LSC's website, and whether the list should remain exhaustive or be made illustrative. LSC considered whether each option for amending the regulation appropriately balanced the desire for notice to recipients about the "Federal law relating to the proper use of Federal funds"

covered by the rule with LSC's interest in expeditiously amending the list of such laws whenever Congress acts to add, repeal, or amend them.

First, the Corporation considered adding the missing statutes to the current § 1640.2(a)(1) list and revising the language to make it clear that the list of statutes is merely illustrative. LSC staff concluded that an illustrative list would not give recipients adequate notice about which laws may be included in this part. Second, LSC considered simply adding the three missing statutes to the current list in § 1640.2(a)(1) and retaining the list's exhaustive nature. LSC staff concluded that this option would not address OIG's concerns about the rule becoming over- or under-inclusive as laws governing the proper use of Federal funds are amended, added, or repealed. Nor would this option improve LSC's ability to update the list in a timely fashion. Finally, LSC considered removing all statutory references from the regulation and instead referring readers to the LSC website, where LSC would maintain an easily updated list of applicable statutes. LSC staff concluded that this option would allow LSC more flexibility to update and revise the list of laws in a timely manner. This option would also provide recipients with adequate notice of the applicable laws because LSC would provide a link to the list in the annual contractual agreement.

LSC proposes to adopt this last option using an exhaustive list of statutes. This approach would require a minor modification in the contractual agreement between the Corporation and its recipients, which currently directs recipients to the § 1640.2(a)(1) list. The Corporation refers to this contractual agreement as the "LSC Grant Assurances," and requires recipients to consent to the agreement annually as a condition of receiving LSC

funding. The Grant Assurances would be modified to direct recipients to the Corporation's website, where the list of applicable laws would be maintained.

As required by the LSC Rulemaking Protocol, LSC staff prepared an explanatory rulemaking options paper, accompanied by a proposed rule amending Part 1640. On January 22, 2015, the Committee voted to authorize LSC to initiate rulemaking and to recommend that the Board approve publishing the proposed rule. On January 24, 2015, the Board approved the proposed rule for publication in the Federal Register for notice and comment. A section by section analysis of the proposed rule is provided below.

III. Proposed List of Federal Laws Relating to the Proper Use of Federal Funds

LSC proposes to post the following list of applicable Federal laws relating to the proper use of Federal funds on the Corporation's website. The list would be subject to change as legislation changes. LSC seeks comment on both the proposal to remove the list from Part 1640 and the proposed list of statutes.

1. 18 U.S.C. 201 (Bribery of Public Officials and Witnesses);
2. 18 U.S.C. 285 (Taking or using papers relating to claims);
3. 18 U.S.C. 286 (Conspiracy to Defraud the Government With Respect to Claims);
4. 18 U.S.C. 287 (False, Fictitious or Fraudulent Claims);
5. 18 U.S.C. 371 (Conspiracy to Commit Offense or Defraud the United States);
6. 18 U.S.C. 641 (Public Money, Property or Records);
7. 18 U.S.C. 666 (Theft or bribery concerning programs receiving Federal funds);
8. 18 U.S.C. 1001 (Statements or Entries Generally);
9. 18 U.S.C. 1002 (Possession of False Papers to Defraud the United States);
10. 18 U.S.C. 1031 (Major fraud against the United States);

11. 18 U.S.C. 1516 (Obstruction of Federal Audit);
12. 31 U.S.C. 3729 (False Claims);
13. 31 U.S.C. 3730 (Civil Actions for False Claims), except that actions that are authorized by 31 U.S.C. 3730(b) to be brought by persons may not be brought against the Corporation, any recipient, subrecipient, grantee, or contractor of the Corporation, or its employees;
14. 31 U.S.C. 3731 (False Claims Procedure);
15. 31 U.S.C. 3732 (False Claims Jurisdiction); and
16. 31 U.S.C. 3733 (Civil Investigative Demands).

IV. Proposed Changes

1640.1 Purpose

LSC proposes to revise § 1640.1 to reflect the changes to § 1640.2.

1640.2 Applicable Federal laws

LSC proposes to delete existing § 1640.2(a)(1), redesignate § 1640.2(a)(2) as § 1640.2(b), and redesignate existing § 1640.2(b)(1) and (2) as § 1640.4(a)(1) and (b)(1) respectively.

Proposed § 1640.2(a) states that the Corporation will maintain a public list of applicable Federal laws. The list will be maintained on the Corporation's website. The contract between the Corporation and the recipient, currently referred to as the LSC Grant Assurances, will be revised to provide recipients with a link to the list.

Removing the list of statutes from the text of the rule will allow the Corporation to modify the list as needed with approval of the Board, rather than requiring LSC to engage in rulemaking prior to making any necessary changes. This change will allow

LSC to update the list more quickly in response to congressional actions adding, amending, or repealing “Federal law relating to the proper use of Federal funds.”

Modification of the list with Board approval does not rule out notice and comment for any changes, but it also does not require notice and comment for any changes. LSC will provide recipients with notice any time the list is modified.

Proposed § 1640.2(b) renumbers and revises existing § 1640.2(a)(2) for clarity and readability. LSC made no substantive changes to this subsection.

Recipients are reminded that OIG has statutory responsibility to investigate the activities covered by the applicable Federal laws. Although the contractual agreement with the Corporation would apply only to LSC funds, recipients are further reminded that OIG investigates reports of possible theft or misuse of a recipient’s non-LSC funds as well as its LSC funds and would report any theft or misuse that is found to the appropriate Federal or State authorities.

1640.3 Contractual agreement

LSC proposes to revise existing § 1640.3 to reflect the removal of the list of Federal law relating to the proper use of Federal funds from §1640.2. LSC also proposes minor editorial changes to the rule.

1640.4 Violation of agreement

LSC proposes to redesignate existing § 1640.2(b)(1) and (2) as § 1640.4(a) and (c) respectively. The proposed move will group each definition in existing § 1640.2(b) with each definition’s consequence for violating the agreement in existing § 1640.4. LSC made no substantive changes to this subsection, but has revised the text for clarity.

List of Subjects in 45 CFR Part 1640

Fraud; Grant programs-law; Legal services.

For the reasons set forth in the preamble, the Legal Services Corporation proposes to revise 45 CFR part 1640 to read as follows:

PART 1640 – APPLICATION OF FEDERAL LAW TO LSC RECIPIENTS

Sec.

1640.1 Purpose

1640.2 Applicable Federal laws

1640.3 Contractual agreement

1640.4 Violation of agreement

Authority: 42 U.S.C. 2996g(e).

§ 1640.1 Purpose.

The purpose of this part is to ensure that recipients use their LSC funds in accordance with Federal law related to the proper use of Federal funds. This part also provides notice to recipients of the consequences of a violation of such Federal laws by a recipient, its employees or board members.

§ 1640.2 Applicable Federal laws.

(a) LSC will maintain a public list of applicable Federal laws relating to the proper use of Federal funds on its website and provide recipients with a link to the list in the contractual agreement. The list may be modified with the approval of the Corporation's Board of Directors. LSC will provide recipients with notice when the list is modified.

(b) For the purposes of this part and the laws referenced in paragraph (a) of this section, LSC is considered a Federal agency and a recipient's LSC funds are considered Federal funds provided by grant or contract

§ 1640.3 Contractual agreement.

As a condition of receiving LSC funds, a recipient must enter into a written agreement with the Corporation that, with respect to its LSC funds, will subject the recipient to the applicable Federal laws relating to the proper use of Federal funds. The agreement must include a statement that all of the recipient's employees and board members have been informed of such Federal law and of the consequences of a violation of such law, both to the recipient and to themselves as individuals.

§ 1640.4 Violation of agreement.

(a) LSC will determine that a recipient has violated the agreement described in § 1640.3 when the recipient has been convicted of, or judgment has been entered against the recipient for, a violation of an applicable Federal law relating to the proper use of Federal funds with respect to its LSC grant or contract, by the court having jurisdiction of the matter, and any appeals of the conviction or judgment have been exhausted or the time for appeal has expired.

(b) A violation of the agreement by a recipient based on recipient conduct will result in the Corporation terminating the recipient's LSC grant or contract without need for a termination hearing. While an appeal of a conviction or judgment is pending, the Corporation may take any necessary steps to safeguard its funds.

(c) LSC will determine that the recipient has violated the agreement described in § 1640.3 when an employee or board member of the recipient has been convicted of, or judgment has been entered against the employee or board member for, a violation of an applicable Federal law relating to the proper use of Federal funds with respect to the recipient's grant or contract with LSC, by the court having jurisdiction of the matter, and

any appeals of the conviction or judgment have been exhausted or the time for appeal has expired, and the Corporation finds that the recipient has knowingly or through gross negligence allowed the employee or board member to engage in such activities.

(d) A violation of the agreement by the recipient based on employee or board member conduct will result in the Corporation terminating the recipient's LSC grant or contract. Prior to termination, the Corporation will provide notice and an opportunity to be heard for the sole purpose of determining whether the recipient knowingly or through gross negligence allowed the employee or board member to engage in the activities leading to the conviction or judgment. While an appeal of a conviction or judgment or a hearing is pending, the Corporation may take any necessary steps to safeguard its funds.

Dated: January 28, 2015.

Stefanie K. Davis

Assistant General Counsel

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